

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	No. 61698-6-I
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
)	
RANDALL L. MCELROY,)	
)	
Appellant.)	FILED: <u>June 8, 2009</u>

Schindler, C.J.—Randall L. McElroy contends the sentencing court erred by including a 1986 conviction that was not used to calculate his offender score in the criminal history section of the judgment and sentence. There is no dispute that the 1986 conviction “washed out” under RCW 9.94A.525. There is also no dispute that the court did not include the washed out conviction in calculating the offender score. Because we conclude that the criminal history section of the judgment and sentence incorporates by reference RCW 9.94A.525 and that the judgment and sentence must clearly indicate that the washed out conviction was excluded for purposes of calculating the offender score, we remand to correct the judgment and sentence.

A jury convicted McElroy of assault in the second degree and bail jumping. At sentencing, the State presented evidence that McElroy had three prior convictions: a

1986 conviction for assault in the third degree, a 2006 conviction for arson in the second degree, and a 2006 conviction for assault in the third degree. McElroy asserted that under RCW 9.94A.525, the 1986 conviction washed out for purposes of calculating the offender score. The State agreed, but argued that the court should consider the conviction in determining imposition of a standard range sentence. There is no dispute that the court did not include the 1986 conviction in calculating the offender score. Without the 1986 conviction, the offender score for assault in the second degree was four and for bail jumping was three. The section of the judgment and sentence entitled “2.2 CRIMINAL HISTORY (RCW 9.94A.525)” lists the three prior felony convictions, including the 1986 conviction that washed out.

On appeal, McElroy asserts that under RCW 9.94A.525, the court erred in listing the 1986 conviction that washed out in the criminal history section of the judgment and sentence. McElroy argues that by expressly incorporating the requirements of RCW 9.94A.525, the criminal history section of the judgment and sentence should only include prior convictions that are used in calculating the offender score. In response, the State ignores the language of the judgment and sentence and the requirements of RCW 9.94A.525. Instead, the State asserts that under RCW 9.94.030(14) and RCW 9.94.500(1) the judgment and sentence must list all prior criminal convictions including the 1986 conviction that washed out. The State also argues that the determination of the offender score is separate from the requirement to set forth all prior criminal convictions.

Statutory interpretation is a question of law and is reviewed de novo. State v.

Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). If a statute is unambiguous, there is no need for judicial interpretation. State v. Smith, 117 Wn.2d 263, 270-71, 814 P.2d 652 (1991). Statutes are “construed as a whole, considering all provisions in relation to each other and giving effect to each provision.” State v. Merritt, 91 Wn. App. 969, 973, 961 P.2d 958 (1998). Related statutory provisions are interpreted together “to achieve a harmonious and unified statutory scheme that maintains the integrity of the respective statutes.” State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282 (2000).

RCW 9.94A.525 provides:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed “other current offenses” within the meaning of RCW 9.94A.589.

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community

without committing any crime that subsequently results in a conviction. . . .

Here, there is no dispute that under RCW 9.94A.525, McElroy's 1986 conviction for assault in the third degree is a class C felony that washed out and was properly excluded from the offender score calculation. However, without any indication that the 1986 conviction washed out and was not used to calculate the offender score, that conviction is listed in the section of the judgment and sentence entitled "2.2 CRIMINAL HISTORY (RCW 9.94A.525)."

The plain language of RCW 9.94A.525 unambiguously requires the court to not include a washed out conviction in the criminal history used for purposes of calculating the offender score. We conclude that by specifically incorporating by reference the requirements of RCW 9.94A.525 in the criminal history section of the judgment and sentence, the judgment and sentence must clearly state the criminal history used in calculating the offender score and expressly indicate whether a prior conviction washed out.

The State does not address the unambiguous language of the judgment and sentence or the requirements of RCW 9.94A.525. The State contends that under RCW 9.94.030(14) and RCW 9.94.500(1), the criminal history section of the judgment and sentence must list all of McElroy's criminal history, including the 1986 conviction that washed out.

RCW 9.94.030(14) defines "criminal history" for sentencing purposes as follows:

"Criminal history" means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in

federal court, or elsewhere.

(a) The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.

(b) A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640, 9.95.240, or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon.

(c) The determination of a defendant's criminal history is distinct from the determination of an offender score. A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant's criminal history.

RCW 9.94A.500(1) requires the sentencing court to set forth the defendant's criminal history:

A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein. If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record.

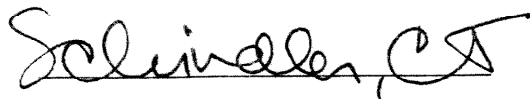
The State argues that because the 1986 conviction was not vacated under RCW 9.94A.030(14), that conviction must be included as part of McElroy's criminal history. The State also argues that the 1986 conviction must be listed in the criminal history section because RCW 9.94A.500(1) requires the court to "specify the convictions it has found to exist" as "part of the record."

The requirements of RCW 9.94A.030(14) and RCW 9.94A.500(1) can be given effect and harmonized with the requirement under RCW 9.94A.525 to exclude washed

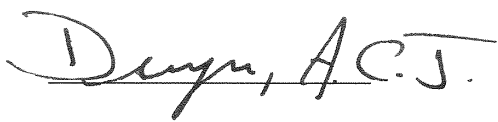
out convictions from the criminal history used to calculate the offender score. The judgment and sentence must set forth all of the defendant's prior convictions as required by RCW 9.94A.030(14) and RCW 9.94A.500(1). But under RCW 9.94A.525, the criminal history section of the judgment and sentence must also accurately reflect the convictions used for purposes of calculating the offender score. If, as here, a conviction washed out, the court can list that conviction in the criminal history section but must then clearly indicate that the conviction washed out and was not used in calculating the offender score. Alternatively, the court can list the washed out conviction in a separate appendix.¹

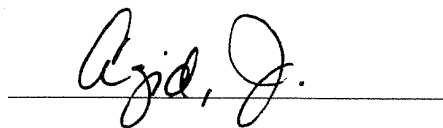
Because the court has the authority to correct clerical errors in a judgment and sentence at any time, resentencing is unnecessary. CrR 7.8(a); see also State v. Hendrickson, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009) (error is clerical if the judgment as amended embodies the trial court's intention as expressed in the record).

We remand to correct the judgment and sentence by clearly stating that McElroy's 1986 conviction for assault in the third degree washed out and was not used to calculate his offender score.



WE CONCUR:





¹ Directly underneath the criminal history section, the judgment and sentence provides: "[a]dditional criminal history is attached in Appendix 2.2."

